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NO. 87-2004

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

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SUPREME COURT, U.S.

PEOPLE OF THE STATE OF ILLINOIS, Petitioner

vs.

ROLANDO CRUZ, Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The respondent, Rolando Cruz, generally accepts the petitioner's Statement of the Case. On seven occasions in its Statement, however, the petitioner erroneously described certain testimony adduced at trial as having been admitted against Respondent Cruz. That testimony was actually admitted against codefendant Hernandez.

In the Petition for Writ of Certiorari at 8, fourth paragraph, the term "Respondent" should be replaced with the name "Hernandez." At the top of 9, third sentence, "Respondent" should be replaced with "Hernandez." On that same page, second paragraph, the term "Respondent" twice should be replaced with "Hernandez." In the Petition at 11, second paragraph, the term "Respondent" should twice be replaced with the name "Hernandez." Finally, in the Petition at 12, fourth paragraph, the term "Respondent" should be replaced with the name "Hernandez."

I.

REASONS FOR DENYING THE WRIT

BECAUSE THE STATE FAILED TO REDACT THE MULTIPLE STATEMENTS OF MR. CRUZ'S NONTESTIFYING CODEFENDANT BY THE USE OF NEUTRAL TERMS, BECAUSE THE STATE ADDUCED TESTIMONY WHOSE ONLY PURPOSE WAS TO IDENTIFY MR. CRUZ'S NAME AS ONE OF THE NAMES REPLACED IN THE REDACTED STATEMENTS, AND BECAUSE THE STATE UNDID THE EFFECT OF THE LIMITING INSTRUCTIONS BY ARGUING TO THE JURY THAT IT COULD CONSIDER THE STATEMENTS OF MR. CRUZ'S CODEFENDANT AGAINST MR. CRUZ, THE ILLINOIS SUPREME COURT PROPERLY HELD THAT MR. CRUZ'S FEDERAL CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS VIOLATED. IN ADDITION, ADEQUATE AND INDEPENDENT STATE GROUNDS, TO WIT, THE VIOLATION OF STATE SEVERANCE LAW, EXIST FOR THE SAME JUDGMENT TO OBTAIN EVEN UPON THE GRANTING OF CERTIORARI AND REVERSAL BY THIS COURT ON THE FEDERAL CONSTITUTIONAL ISSUE.

It is clear from the opinion of the Illinois Supreme Court in People v. Cruz, 121 Ill.2d 321, 521 N.E.2d 18 (1988), that the court fully comprehended this court's holdings in Bruton v. United States, 391 U.S. 123 (1968), and Richardson v. Marsh, 481 U.S. ___, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), before it endeavored to apply the principles derived from Bruton and Richardson to the case at bar. The Cruz court duly noted that the federal constitutional issue with which it was presented fell somewhere between the "admission of a codefendant's confession which explicitly names the defendant (Bruton) and the admission of one which contains no reference at all to a defendant (Richardson)." 121 Ill.2d at 330, 521 N.E.2d at 22 (emphasis original).

A unanimous Illinois Supreme Court held that the confrontation clause is violated where the multiple statements of a nontestifying codefendant are admitted at the joint trial of three persons after the statements have been redacted to remove the names of the codefendants but, rather than replacing the codefendants' names with neutral pronouns, the non-neutral terms "friends" and "two named individuals" are employed, where the context of the joint trial and acquaintanceship testimony serve to reveal the identity of names replaced in the redacted statements, and where the prosecutor's closing argument instructs the jury, contrary to the limiting instructions, that because the codefendants are friends the jury may consider each one's

admissions against the others. People v. Cruz, 121 Ill.2d at 331, 521 N.E.2d at 23.

The Illinois Supreme Court cited Bruton and its own earlier precedents for the proposition that "there are circumstances under which the presumption that a jury can and will follow a trial court's instruction to disregard an incriminating inference generated by a confession or admission introduced against a codefendant must fall." 121 Ill.2d at 331, 521 N.E.2d at 22. The court found that, "although Hernandez's admissions are not directly inculpatory of defendant, in that they did not explicitly state to the jury that Rolando Cruz was his accomplice, the nature of these redactions in the context of the joint trial and the testimony linking Cruz with Hernandez rendered it impossible for the jury to conclude that the persons to whom Hernandez referred were anyone other than the two men seated next to him in the courtroom." 121 Ill.2d at 331, 521 N.E.2d at 23.

The Illinois Supreme Court noted that in Richardson this Court "rejected the theory of contextual inculpation because the confession by codefendant made no reference at all to the defendant and became incriminating only when coupled with the defendant's own testimony." See, Richardson v. Marsh, 481 U.S. at ___, 107 S.Ct. at 1709, 95 L.Ed.2d at 188 ("[T]he Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence.") Respondent concurs that where the nontestifying codefendant's statement has been redacted to remove all reference to the defendant and the statement is admitted at the joint trial, the defendant is not denied his right to confront the witnesses against him.

As the Illinois Supreme Court noted, however, this was not such a case. In fact, the federal constitutional question addressed in Cruz was even quite different from the question explicitly left open by this Court in Richardson: whether a confession would be admissible "in which the defendant's name has been replaced with a symbol or neutral pronoun." 481 U.S. at ___

n. 5, 107 S.Ct. at 1709 n. 5, 95 L.Ed.2d at 192 n. 5. Not only were all references to the codefendants not removed from the admitted statements, but the substituted terms in no way can be described as "neutral." The Illinois Supreme Court relied on the inadequacy of the redactions, the context of the joint trial and the effect of the prosecutor's closing argument which undid the limiting instructions in distinguishing this case from Richardson:

> In the case before us, the physical setting of the trial as well as the prosecution's introduction of acquaintanceship evidence formed an impermissibly incriminating context when they established the terms "friends" and "two named individuals" as thinly veiled references to Hernandez' codefendants. No "substantial inference" was required of the jury to identify defendant as one of the "friends" mentioned by witnesses to Hernandez' statements. (See United States ex rel. Nelson v. Follette (2d Cir. 1970), 430 F.2d 1055, 1059.) As a result, it would be unrealistic in the extreme to expect a jury to ignore the clear import of Hernandez' statements, despite their redaction.
>
> Furthermore, any possibility that the jury would be able to follow the court's limiting instructions was removed when the prosecution encouraged the jurors to consider each codefendant's admission against the other defendants, implying that the defendants' friendship allowed them to do so.
>
> People v. Cruz, 121 Ill.2d at 331, 521 N.E.2d at 23.

Rather than aligning the Illinois Supreme Court on the "wrong side of what petitioner respectfully suggests is a post-Richardson split among the Circuit Courts of Appeals regarding the substitution of neutral terms as a means of redacting statements of non-testifying codefendants," the court's decision is easily reconciled with the cases cited by the State. (Petition for Writ of Certiorari at 23) Where the term "friends" is substituted, and context and other identifying evidence clearly reveal the codefendants to be those whose names have been removed, it cannot be said that the redaction was accomplished with a "neutral" term. That is precisely what the court held in United States v. Petit, 841 F.2d 1546 (11th Cir. 1988); see also, Alexander v. State, 562 S.W.2d 207 (1977) (Tenn.Crim.App.), and People v. Bell, 302 N.Y.S.2d 946, 32 A.D.2d 781 (1969), both of

which were cited by the Illinois Supreme Court in its decision in which it reversed the convictions and death sentence of Mr. Cruz's codefendant on similar grounds. People v. Hernandez, 121 Ill.2d 293, 521 N.E.2d 25, 35 (1988).

The State contends that a "post-Richardson split" exists because Petit and United States v. Diaz, 836 F.2d 385 (8th Cir. 1987), reached contrary conclusions with respect to the question of whether the defendant was contextually inculpated. In Diaz, however, the codefendant's statement was redacted so that the neutral term "someone" was substituted for the defendant's name. The Diaz court held that because there was no direct reference to the defendant, Bruton was not violated. The court then acknowledged that this Court left open in Richardson the admissibility of a confession in which the defendant's name has been replaced with a neutral pronoun. The court concluded: "Finally, even if the reference to Diaz's role were to take this case out of the rule in Marsh, introduction of the statement was beyond a reasonable doubt only harmless error." United States v. Diaz, 836 F.2d at 391 (citations omitted).

Mr. Cruz concurs that the removal of the defendant's name and its replacement with a term as innocuous as "someone" in a single statement of a codefendant would not be violative of the confrontation clause. Very distinct facts compelled the Eighth and Eleventh Circuits to arrive at different conclusions on the question of whether a criminal defendant was contextually inculpated.

Significantly, the Diaz court further indicated that under its own and other federal precedents, it would be error if the redacted statement alerted the jury to the fact that a name available to the prosecution had been purposely omitted. Id. at 390-391. See, United States v. Brierly, 501 F.2d 1024 (8th Cir. 1974), cert. denied, 419 U.S. 1052 (1974); Clark v. Maggio, 737 F.2d 471 (5th Cir. 1984), cert. denied, 470 U.S. 1055 (1985).

In his original brief, Mr. Cruz urged as an additional ground for the reversal of his convictions that the jury was explicitly apprised that the statements of his codefendant had

been redacted to remove the identities of persons who originally were named in the statements. Mr. Cruz claimed that he was denied his right to confront the witnesses against him in violation of United States v. Danzey, 594 F.2d 905, 917-919 (2d Cir. 1979), cert denied, 441 U.S. 951 (1979).

Not only did Officer Winkler testify that Hernandez told him that he and "two named individuals" performed certain illegal acts, but the prosecutor also prefaced his questions to witness Estremera by instructing the witness, "[D]o not mention the name of any other person to whom [Hernandez] referred." The Illinois Supreme Court cited Danzey and indicated that its conclusion that Mr. Cruz was denied a fair trial was buttressed by the jurors' being put "on notice that testimony was being edited to protect someone involved in the trial, encouraging them to speculate as to the missing names." People v. Cruz, 121 Ill.2d at 333-334, 521 N.E.2d at 24.

The State further argues that had the jury been unable to follow its instructions, "it would have convicted codefendant Buckley as well as defendant." (Petition for Writ of Certiorari at 27) Because it did not do so, the State concludes, "it is unreasonable to conclude that the jury was unable to follow the instructions given concerning statements made by Cruz and Hernandez." Id.

The State's reasoning is specious. Codefendant Buckley was not acquitted of the offenses charged. It cannot be said, therefore, that he was not prejudiced by the admission of his codefendants' statements at the joint trial. After codefendants Cruz and Hernandez were sentenced to death and prior to Buckley's scheduled retrial, the State moved successfully to dismiss the charges against Buckley, who the State consistently maintained was the principal for whose acts Mr. Cruz was merely accountable. The fact of dismissal virtually compels the conclusion that the jury's inability to reach a verdict as to Buckley, rather than outright acquitting him, resulted from the admission of codefendants' statements.

Finally, this Court should deny the writ because, contrary to the State's assertion in that portion of its petition labeled "Jurisdiction," the decision of the Illinois Supreme Court also rested on adequate and independent state grounds.[1]

In Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983), this Court stated that "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. ... If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." This Court further indicated that it views its inability to render advisory opinions as a limitation on its jurisdiction: "[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." 463 U.S. at 1041, quoting from Herb v. Pitcairn, 324 U.S. 117, 124 (1945) (footnote omitted).

In his brief on appeal, Mr. Cruz argued first to the Supreme Court of Illinois that his convictions should be reversed on the ground that they were obtained in violation of state severance law. Mr. Cruz next argued that his convictions were infirm because the terms substituted for his name in the redacted

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1 In fact, the Illinois Supreme Court cited Richardson for the proposition that Mr. Cruz's confrontation right was violated where the State adduced the testimony of certain witnesses solely for the purpose of demonstrating friendship among the codefendants and where it attempted "during closing argument to lead the jury to connect defendant with Hernandez' statement." 121 Ill.2d at 333, 521 N.E.2d at 24. In Richardson, this Court ruled that it is error for the prosecutor to undo the effect of the limiting instruction by urging the jury to use the codefendant's statement against the defendant in evaluating the defendant's case. 481 U.S. at ___, 107 S.Ct. at 1709, 95 L.Ed.2d at 188. While the prosecutor's misuse of codefendant Hernandez's statements at closing argument constituted a separate federal constitutional ground upon which the Illinois Supreme Court's decision rested, the State has not sought certiorari on that issue and has, instead, dismissed it in a footnote as having been misapprehended by the Illinois Supreme Court. See, Petition for Writ of Certiorari at 24 n. 1.

statements of codefendant Hernandez were inadequate as a matter of state and federal law, and that those redactions, when viewed in the context of the joint trial and in light of friendship testimony and the prosecutor's closing argument, contextually inculpated him. Lastly, Mr. Cruz argued that his confrontation right was abridged where the State explicitly indicated to the jury that names had been removed from codefendant Hernandez's statements, leaving the jury free to speculate that Mr. Cruz was named in those statements.

Even in the absence of federal constitutional grounds for reversing Mr. Cruz's convictions, the Illinois Supreme Court would have reversed the convictions on its determination that Mr. Cruz and his codefendants should have been tried separately as a matter of state law. The Cruz court based the state law portion of its decision on People v. Daugherty, 102 Ill.2d 533, 541, 468 N.E.2d 969, 973 (1984), in which the court earlier had stated that severance should be granted where the defendant has predicted with specificity in advance of trial how he will be prejudiced by proceeding with a joint trial. "In ruling on the motion for severance the trial judge must make a prediction about the likelihood of prejudice at trial, taking into account the papers presented, the arguments of counsel, and any other knowledge of the case developed from the proceedings." 102 Ill.2d at 541, 468 N.E.2d at 972-973.

The prejudice to which Daugherty refers may derive from statements of a codefendant which implicate the defendant. They may implicate him directly or contextually. 102 Ill.2d at 521-542, 468 N.E.2d at 972-973, citing Bruton and People v. Clark, 17 Ill.2d 486, 162 N.E.2d 413 (1959). See, People v. Johnson, 13 Ill.2d 619, 150 N.E.2d 597 (1950) (severance should have been granted where redactions in which defendant's name was removed from codefendant's statements and replaced with the term "blank," and additional "identifying material" advised the jury that the unnamed person was the defendant); People v. Hodson, 406 Ill. 328, 94 N.E.2d 166 (1950) (defendant contextually inculpated where his name was removed from the codefendant's statement and

the letter "A" was substituted). Johnson and Hodson were cited approvingly in Clark, 17 Ill.2d at 490-491, 162 N.E.2d at 416, and Cruz, 121 Ill.2d at 331, 521 N.E.2d at 22.

The Illinois Supreme Court analyzed the state severance issue thusly:

> [T]he prosecution's course was sufficiently clear in advance of trial, during argument on the defendant's motion to sever, as the People had indicated their intention to introduce statements detailing a friendship among the defendants. Given the People's heavy reliance upon the inculpatory statements of the codefendants, the likelihood of prejudice was predictable enough to require a severance. (See People v. Daugherty (1984), 102 Ill.2d 533, 541, 82 Ill.Dec. 315, 468 N.E.2d 969.) While the circuit court ordered the parties to cooperate in redacting the defendant's statements, it apparently never ruled on a final edit. The record reveals that it became increasingly clear in the course of the trial that the redactions were insufficient to safeguard defendant's rights. When the prosecution introduced the acquaintanceship testimony of Rodriquez and Montanez, following the testimony on Hernandez' admission, the prosecution's announced course was completed and the predicted prejudice realized.
>
> Cruz, 121 Ill.2d at 334-335, 521 N.E.2d at 24.

Hence, it is clear that the Illinois Supreme Court would have reversed Mr. Cruz's convictions even in the absence of the federal constitutional violations described in the court's opinion. Therefore, even if this Court were to grant certiorari and find that the Illinois Supreme Court had misapplied federal law, the same judgment would be rendered in state court: Mr. Cruz's convictions would be reversed and the cause remanded for a new trial. Therefore, this court's opinion on the federal constitutional question would simply be advisory. Michigan v. Long, 463 U.S. at 1041.

CONCLUSION

For the foregoing reasons, respondent Rolando Cruz respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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